



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

**AMENDED
DECISION**

(petitioner)
c/o Attorney Benjamin Adams
Adams & Woodrow S C
301 Nicolet Boulevard
Neenah, WI 54956-2788

MRA-44/49009

PRELIMINARY RECITALS

Pursuant to a petition filed May 1, 2001, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Outagamie County Dept. of Human Services in regards to Medical Assistance (MA), a hearing was held on May 30, 2001, at Appleton, Wisconsin. This Amended Decision is issued solely to correct a scrivener's error as to a relevant date in Finding #3 and the ORDER in the original Decision dated June 22, 2001.

The issue for determination is whether the petitioner is entitled to a resource re-allocation under MA rules.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o Attorney Benjamin Adams
Adams & Woodrow S C
301 Nicolet Boulevard
Neenah, WI 54956-2788

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Sue K. Verbrick, ESS
Outagamie County Dept Of Human Services
401 S. Elm Street
Appleton, WI 54911-5985

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: 398-62-7091; CARES: #0111377609) is a resident of Outagamie County. She resides in a nursing home; her husband remains in the community.
2. An application for MA was filed on petitioner's behalf on March 9, 2001, seeking MA back to December 1, 2000. After compiling a summary of petitioner's income and assets, the county denied the application on April 30, 2001 because assets were over the limit.
3. As of December, 2000, petitioner's monthly income was \$468 in Social Security benefits and \$0.11 from her nursing home savings account, or a total of \$468.11. Petitioner's husband's monthly income was \$941 Social Security, and \$327 from an individual retirement account (IRA). The couple also received income jointly of approximately \$589.69 per month from bank accounts, savings bonds, and an investment account pooling earnings derived from mutual funds, equities and money market investments. See, Exhibit #7.
4. Total non-exempt assets as of April 27, 2001, as determined by the county were \$136,352.64. (Later, this was amended to \$136,881.64.) The county gave petitioner's husband a community spouse allotment of \$68,176.32, added the \$2,000 MA asset limit to the petitioner's one-half asset share for a total asset limit of \$70,176.32, and determined that petitioner was approximately \$66,705.32 over the asset limit.
5. The petitioner filed an appeal with the Division of Hearings & Appeals on May 1, 2001, requesting a reallocation of all assets, and the income generated by these assets, to the community spouse; and for a determination of the applicable spousal income allocation.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. WI Stat § 49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. WI Stat § 49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county determined that the current asset allowance for this couple is \$68,176.32. See the MA Handbook, App. 23.4.2, which is based upon WI Stat § 49.455(6)(b). \$2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy, i.e., \$70,176.32. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance in this case was \$1,875 in December, 2000. MA Handbook, Appendix 23.6.0 (5-1-00). As of May 1, 2001, the allowance increased to \$1,935. Handbook, App. 23.6.0 (5-1-01).

WI Stat § 49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part as follows:

If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

Based upon the above, a hearing examiner can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, __ N.W. 2d __, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the hearing examiner first must allocate resources to maximize the community spouse's income, and only if the resources' income does not bring the community spouse's income up to the monthly minimum can the institutionalized spouse's income be allocated. The Blumer decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

The result in this case is as follows. Petitioner's husband's individual monthly income is \$1,268. Allocating the assets to him adds \$589.69 in additional monthly income, thus bringing his total monthly income to \$1,857.69. Since the total is below \$1,875, the result is that all of the couple's non-exempt assets are re-allocated to petitioner's husband. The county will reallocate some or all of petitioner's sole income to her husband when it determines her monthly cost of care under the MA rules. I will remand the matter to the agency to re-allocate the resources and review and re-determine her cost of care contribution, all retroactive to December 1, 2000.

CONCLUSIONS OF LAW

All of the non-exempt assets of petitioner and her husband must be allocated to her husband to maximize his monthly income.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to increase the community spouse asset share to \$136,881.64, and to re-determine petitioner's MA eligibility retroactive to December 1, 2000, based upon the new community spouse asset allocation; and to determine the petitioner's cost of care liability retroactive to December 1, 2000. The county shall do so within 20 days of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2001.

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
79/KDD

cc: Outagamie Co. DHS - Barb Spaude
DHFS - Susan Wood